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IN THE
SUPREME COURT OF THE UNITED STATES

RAYMOND J. BRADER,
Petitioner

Versus

LANDIS MANUFACTURING SYSTEMS, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN AFFIRMING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT/EMPLOYER ON PETITIONER ON PETITIONER/EMPLOYEE'S AGE DISCRIMINATION CLAIM PURSUANT TO 29 U.S.C. §621 et seq WHERE GENUINE ISSUES OF MATERIAL FACT EXIST CONCERNING RESPONDENT'S CONTRADICTORY ALLEGATIONS THAT IT TERMINATED PETITIONER DUE TO PERFORMANCE DEFICIENCIES AND LATER THAT IT TERMINATED PETITIONER DUE TO ECONOMIC CONDITIONS WHERE THE EVIDENCE OF RECORD DEMONSTRATES THAT RESPONDENT RETAINED YOUNGER, LESS EXPERIENCED, LESS SUCCESSFUL SALESPEOPLE?

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Respondent

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Raymond J. Brader, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit entered 3/14/94 is unrecorded and appears at page 1a of the Appendix hereto.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered July 14, 1993 is unrecorded and appears at page 3a of the Appendix hereto.

The Order of the United States Court of Appeals for the Third Circuit, per Greenberg, J., dated March 18, 1993 is unrecorded and appears at page 4a of the Appendix hereto.

The Order of the United States District Court for the Eastern District of Pennsylvania per Troutman, S.J. dated october 16, 1992 is unrecorded and appears at page 5a of the Appendix hereto.

JURISDICTION

The final Order of the United States Court of Appeals For The Third Circuit is dated March 14, 1993, and this Petition For Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

29 U.S.C. §621 et seq at Appendix Page 29a.

STATEMENT OF THE CASE

A. Procedural History

Petitioner filed this action against his ex-employer, Respondent seeking damages arising out of Respondent's termination of Petitioner's employment based upon Peti-

tioner's age. After discovery, Respondent filed a motion for summary judgment. Accepting Respondent's factual support for its proffered reasons for termination, the District Court granted summary judgment. Petitioner submitted an appeal to the United States Court of Appeals for the Third Circuit from the District Court's grant of summary judgment. (Third Circuit No. 92-2065 under the same caption as this case.) Thereafter, Petitioner informed the Third Circuit that said appeal was not properly before the third Circuit Court of Appeals due to Defendant/Respondent's outstanding Counterclaim aainst Plaintiff/Petitioner. Please see Order of March 18, 1993 of United States Court of Appeals Third Circuit at page 4a). On July 15, 1993, the parties entered a Stipulation and Order in which Defendant/Respondent's Counterclaim was dismissed with prejudice. This Petitioner filed another

appeal of the District Court's grant of summary judgment to the Third Circuit. On March 14, 1994 the third Circuit affirmed the District Court Order. Petitioner respectfully seeks review by this Honorable Court.

b) Statement of Facts

Petitioner was born on February 22, 1940, and began his employment with Landis Manufacturing Systems, Inc. in December 1983.[1] Respondent, Landis Manufacturing Systems, Inc is in the business of manufacturing machined parts.

Prior to Petitioner's employment, Respondent Landis had no business relationship with Mack Trucks, Inc., Dana Carp, Central Sprinkler and other smaller businesses. When Petitioner joined Landis Manufacturing Systems, Inc. in December

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1.All references to the facts are to Plaintiff's affidavit as set forth in Appendix Volume One, pp. 24a-31a inclusive.

1983, he single-handedly developed accounts from Mack Trucks, Inc., Dana Corp., Central Sprinkler and others which generated revenues for Respondent on an annual basis from a minimum of $3 Million up to $5 Million Dollars. This business was developed solely by Petitioner for the benefit of Respondent from 1983 up to 1989. By the time of Petitioner's termination, the Mack Truck business that he was generating accounted for 60% of all of Landis' gross revenues. In addition to this "new" business, Petitioner also handled in house accounts which generated anywhere from $1 Million to $2 Million additional dollars for Respondent.

Randall Ocamb, d.o.b. March 11, 1961, was the son of Hubert Ocamb, an original owner of Landis Manufacturing Systems, Inc. Randall Ocamb completed high school in June of 1979, but did not complete his college courses until January of 1985. While Ran-

dall Ocamb was in high school and college, he periodically worked at his father's business in the janitorial positions and other similar positions between June 23, 1976 until January 7, 1985.

Petitioner was already employed as a full time salesperson/marketing person, and when Randall Ocamb finally completed college, Petitioner was one of the persons initially assigned to help him develop new accounts. One of the accounts that Petitioner assisted Randall Ocamb in developing was the Raytheon account.

In the late 1980's Randall Ocamb and Petitioner were the entire sales force of Respondent, Landis. On or about August 1, 1988, Chris R. Brick, d.o.b. May 23, 1952, joined the sales team as a new employee. When Chris R. Brick became a Landis employee, he specifically complained to Petitioner that it meant starting all over as a new employee, and he had to give up

his pension benefits as an employee of Thomas Scientific Company.

Chris R. Brick was brought to Landis on August 1, 1988 to develop new accounts, but he was unsuccessful in getting new accounts for Landis. Hence, one of Petitioner's "in house" accounts, Ingersoll Rand, was given to him in an effort to get him started. Prior to Petitioner's termination, Chris Brick advised Petitioner that he was dissatisfied with his performance at Landis because he was failing to bring in new business, and he was only working on business that Petitioner had given him from Ingersoll Rand.

On September 29, 1989--after six consecutive years at Landis--after singlehandedly bringing in new accounts from Mack Trucks, Inc., Dana Corp., Central Sprinkler and others worth between $3 Million to $5 Million a year, Petitioner was selected for layoff in the three man department of

Brader, Ocamb and Brick. At the time of the layoff, Petitioner was 49 years of age, and Randall Ocamb was 28 years of age, and Chris Brick was 37 years of age.

Petitioner was the most senior salesperson at Landis. He developed and maintained the most accounts, and Petitioner, alone, was selected for layoff while the salespersons under 40 were maintained. At the time of Petitioner's termination, he attempted to ascertain whether or not the layoff was temporary or permanent, but Respondent refused to commit itself.

Even after Petitioner's termination on September 29, 1989, the business that he had developed at Mack Trucks, Inc. and Dana Corp. was the largest bulk of my employer's work, and was responsible for keeping Landis in operation. Petitioner deomonstrated that his termination was the result of his age because Landis laid Petitioner

off as their most senior salesperson, and kept on two under 40 males with less sales experience, and less success in getting accounts than Petitioner had experienced.

The claim that Petitioner was the least senior person is pretextual on its face because Petitioner was clearly the more senior person to Randall Ocamb because Ocamb did not even begin full time employment with the Company until after Petitioner was employed there. The only way Respondent can make his employment more senior to Petitioner is to count his periodic, part-time jobs starting at age 15 pushing a broom in the factory as the equivalent of Petitioner's full-time sales employment.

Chris Brick was also junior to Petitioner in that he started as a new employee at Landis in August of 1988, and was not very successful in that position culminating in his own voluntary

resignation in March of 1990. In other words, Respondent kept the two junior younger employees who were not particularly successful, and laid off Petitioner while at the same time maintaining business on the two major accounts that Petitioner singlehandedly developed for them, namely, Mack Trucks, Inc. and Dana Corp. in addition to others.

In the DeFazio Affidavit, (App. Vo. II,p. 130a), he claims that he talked with Petitioner about new business coming in, and Petitioner told him there was none. That is wholly inaccurate. On September 28, 1989, Petitioner told DeFazio that he brought new "Request For Quotations" to replace declining business at Mack. Petitioner's "RFQ" would have guaranteed approximately $3.5 Million in "new" annual business with Mack Trucks, but Respondent's competitors were undercutting them. Petitioner told him that there was a high

margin in this business, and if he would give Petitioner some latitude in negotiating with Mack Trucks, Petitioner might be able to secure this business in the amount of $3.5 Million. Despite this express statement of potential new business of $3.5 Million, Petitioner was laid off on that very day. The claim that Petitioner said that there was no new business is a fabrication on DeFazio's part. That is exactly why Petitioner was curious about the Raytheon contract. Petitioner figured Randall Ocamb would have to be beating a $3.5 Million contract to be doing better than Petitioner was, and Petitioner knew he was absolutely <u>not</u> doing that. Apparently, Respondent thought it could get the $3.5 Million contract from Mack without Petitioner. Apparently, they were wrong.

Petitioner's contact with Laurie Pizza was purely investigatory to determine whether or not there was some unknown

justification for keeping young Randall Ocamb on the Raytheon account. The answer to Petitioner's inquiry was NO, Randall Ocamb did not get a big contract from Raytheon thereby confirming Petitioner's belief that he was the victim of age discrimination.

In addition, after Petitioner left because of allegedly declining business, Respondent hired three young men under age 40, namely, Ray Pyontek, Craig Burnett, and Kelly Rawley, and never called Petitioner back. The fact that the Company was hiring three new salespersons under 40 on salary basis commencing within four (4) months of Petitioner's termination corroborates that Petitioner was the victim of age discrimination, and that Respondent was <u>not</u> having the major decline in business which was purported to be the reason for the layoff.

The claim that Randall Ocamb secured a large order from Raytheon is exactly the

opposite of Petitioner's evidence. Even if it is accurate, however, it must be remembered that the Raytheon account was one that Petitioner originally helped Randall Ocamb develop, and if he did succeed in getting this major account in Raytheon, then Respondent clearly would have been in a position to bring Petitioner back as a salesperson. That did not happen, and instead 3 other under 40 males were hired, and Chris Brick voluntarily quit because of his own evaluation that he could not do the job.

It is interesting to note that Respondent has substantially changed its story in that it reported to the Human Relations Commission as follows:

> "The respondent's position is that your lay off was intended as a discharge because of alleged performance deficiencies."

That claim--that Petitioner was discharged for performance deficiencies--is pure "baloney", and Petitioner's level of

sales at Mack Truck, Dana Corp and others demonstrates that. Given the fact that Petitioner can document his outstanding sales performance and the "lackluster" record of Randall Ocamb and Chris Brick, Respondent was obligated to change its story, and claim that Petitioner was the low man on the totem pole. That equally was "baloney" because Randall Ocamb was clearly junior to Petitioner, and his full-time non-janitorial employment only began after his graduation from college and while Petitioner was already there. In addition, subsequent replacements were under age 40, and Petitioner was never recalled just as they postulated in the letter of October 17, 1990 to the Human Relations Commission. Petitioner was never recalled because management wanted a young sales team. They figured that they had a lock on the business from Mack Trucks, Dana Corp. and Central Sprinkler that Petitioner brought

them, and Petitioner was dispensable because of his age. That is exactly why it is age discrimination.

The Circuit Court erroneously affirmed the District Court's rejection of Petitioner's evidence which attacks Respondent's factual support for its proffered reasons for termination. Petitioner's Petition For a Writ of Certiorari is now before this Honorable Court for disposition.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

ARGUMENT

WHETHER OR NOT THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN AFFIRMING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT/EMPLOYER ON PETITIONER ON PETITIONER/EMPLOYEE'S AGE DISCRIMINATION CLAIM PURSUANT TO 29 U.S.C. §621 et seq WHERE GENUINE ISSUES OF MATERIAL FACT EXIST CONCERNING RESPONDENT'S CONTRADICTORY ALLEGATIONS THAT IT TERMINATED PETITIONER DUE TO PERFORMANCE DEFICIENCIES AND LATER THAT IT TERMINATED PETITIONER DUE TO ECONOMIC CONDITIONS WHERE THE EVIDENCE OF RECORD DEMONSTRATES THAT RESPONDENT RETAINED YOUNGER, LESS EXPERIENCED, LESS SUCCESSFUL SALESPEOPLE?

Disputed facts preclude summary judgment. Federal Rule of Civil Procedure 56(c) states that summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Small v. Seldows Stationary, 617 F.2d 922 (3d Cir, 1980). The Court does not decide issues of fact, but simply determines if there is an issue of fact to be tried. Ettinger v. Johnson, 556 F.2d 692 (3d Cir, 1977). The facts must be viewed in the light most favorable to the opposing party, and any reasonable doubt as to the exist-

ence of genuine issues of fact is to be resolved against the moving parties. Continental Insurance Company v. Bodre, 682 F.2d 436 (3d Cir, 1982). Applying this standard to the case at bar, Respondent's Motion ought to have been be denied.

1. Petitioner established a prima facie case of age discrimination. Petitioner establishes a prima facie case by demonstrating that: 1) Petitioner belongs to a protected class; 2) Petitioner was qualified for the position; 3) Petitioner was fired despite being qualified; and 4) Petitioner ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The trial court agreed that Petitioner properly established these elements.

Having proved its prima facie case, Respondent must articulate a legitimate,

non-discriminatory reason for terminating Petitioner. Respondent claims that Petitioner did not have new business coming in and that Respondent had the least seniority of the sales force. For the reasons set forth below, Respondent's alleged reasons for discharging Petitioner are after the fact attempts to cover up the true discriminatory reasons.

After Respondent presents its evidence of a non-discriminatory reason for the employment decision, Petitioner has the opportunity to discredit this evidence by showing that the reason was pretextual. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Petitioner may meet this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or, indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 256, 101 S.Ct. at

1095.

2. Respondent's proffered reasons for firing Petitioner are unworthy of credence. Direct proof of age discrimination is not required because it is often unavailable or difficult to find. Dillon v. Coles, 746 F.2d 99, 1003 (3d Cir, 1988). Petitioner need not prove that age was the only factor in the decision, just that age made a difference in the employer's decision. Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir) (en banc), cert dismissed, 108 S.Ct. 26 (1987).

References to be drawn from the underlying facts contained in the evidential sources must be reviewed in the light most favorable to Petitioner. Goodman v. Mead Johnson Co., 534 F.2d 566, 573 (3d Cir, 1976) cert denied, 429 U.S. 1038 (1977).

a. Petitioner had the greatest proven sales record of all Respondent's salespeople. When Respondent hired Peti-

tioner, Mack Trucks, Inc. was not a customer of Respondent. (App.Vol 1, p. 24a). Petitioner came to Respondent from another machine shop where Petitioner had sold to Mack Trucks for years. (App. Vol. 1 p. 24a-27a). When Respondent hired Petitioner, Petitioner brought Mack Trucks, Inc. to Respondent. (App.Vol. 1, p. 24a-27a).

Mack Trucks constituted about 60 percent of Respondent's total business. Petitioner's Mack sales were in the range of $4 Million Dollars annually. (App. Vol. 1, p. 25a-31a.

b. Petitioner had the longest tenure of service for Respondent in Respondent's sales department. Although Respondent attempts to claim that Petitioner was the least senior sales person, the truth is the opposite. Respondent had no bona fide seniority system and instead, after the fact, is attempting to claim that Ocamb who started in sales in 1985, and who Petition-

er trained is senior to Petitioner. A logical reading of the facts demonstrates this is Respondent's attempt to cover up age discrimination. Please see, App. Vol. 1, p. 25a-31a.

c. Respondent's claim that Respondent believed Petitioner had no potential sales while other sales representatives did is pretextual. In fall, 1988, Petitioner began discussions with Respondent concerning new business opportunities for Respondent with Mack. (App. Vol. 1 p. 25a-31a). Respondent was unwilling to work with Petitioner to make Respondent's price competitive with Respondent's competitors. Id. Petitioner was aware of the general economic downturn and looked ahead to avoid losses for Respondent.

Respondent's alleged reliance upon Brick's projected numbers is pretextual.

To the extent Respondent states that Brick and Ocamb did in fact produce pro-

jected sales, that would be irrelevant. First, Petitioner was told Brick and Ocamb did not realize great sales. But--even if they did--the later sales are irrelevant. The focus must remain on Respondent's motive at the time of Petitioner's termination. Petitioner was the most senior salesman with the largest sales successes. Petitioner's sales represented about 60 percent of Respondent's total annual revenues whereas Brick and Ocamb together brought in about 40 percent. Respondent ought not be allowed to win summary judgment on the alleged subjective statements of sales representatives which Respondent admitted it did not necessarily believe at the pertinent time. Instead, Respondent used these combination of circumstances which Respondent, not Petitioner created, as an after the fact rationalization for firing Petitioner to cover up the true discriminatory reason.

d. Petitioner performed all responsibilities which Respondent's two other salespeople performed. Respondent hints that Ocamb had additional job responsibilities, making Ocamb more valuable than Petitioner. This is false.

Petitioner's job included the same responsibilities as Randall Ocamb's job. (App. Vol. 1, p. 31a-32a). Respondent's salespeople did their own marketing and sales. Id. No separate marketing department existed. Id. Respondent manufactured no products. Respondent was a service company. Thus, sales people were all responsible for developing their own sales and marketing. Id. Respondent's reliance upon the false assertion that Ocamb had additional responsibilities is knowingly false. This is another attempt by Respondent, after the fact, to justify firing Petitioner. Hence, Respondent's motion for summary judgment ought to have been denied.

e. Respondent's claim that it did not recall Petitioner because Petitioner acted improperly after termination is pretextual. Respondent never informed Petitioner that Respondent would recall Petitioner. To the contrary, Respondent told Petitioner that Respondent was not going to call back Petitioner. (App. Volume One p. 24a-31a). Id. However, if Respondent truly did intend to call Petitioner back, Respondent should have done so before hiring substantially younger replacements for Petitioner.

The truth is Respondent fired Petitioner based upon age. Respondent claims economic conditions necessitated Petitioner's termination (even though he had the most sales experience and success for Respondent). Respondent realizes that if economic conditions were the true reason for Petitioner's termination, logically, Respondent ought to have recalled Petition-

er when conditions improved necessitating the hiring of new sales people.

Faced with this inconsistency, Respondent is now attempting to allege that Petitioner acted improperly after termination. Respondent now relies upon one unreliable report which report is contradicted, for the proposition that Respondent turned unethical after termination. Respondent fired Petitioner abruptly--without notice or warnings. Respondent's termination meeting with Petitioner was short and no details were discussed.

The next day, Petitioner telephoned Alfred Reeves to obtain details about Petitioner's severance package. Laurie Pizza answered Reeves phone stating Reeves was not available. Petitioner asked Pizza how Petitioner's account wound up for the month, (i.e., if projected business came in). Because Respondent allegedly based its termination on the fact that the two

younger sales people forecasted more business, Petitioner also inquired if that business materialized. Petitioner sought no proprietary or confidential information. (App. Vol. One, pp 27a-31a).

Now, after the fact, Respondent is attempting to justify its failure to believe Petitioner and instead replaced Petitioner with younger salespeople. Respondent's explanation is unworthy of credence. Burdine, supra. Hence, Respondent's motion for summary judgment ought to have been denied.

f. Economic considerations such as salary savings that can be realized by substituting a younger worker for an older worker can never constitute a permissible non-discriminatory reason for replacement. e.g. Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir, 1987).

When Respondent fired Petitioner, Petitioner was earning about Fifty Thousand

Dollars salary per year, plus full benefits and bonus on sales. Upon information and belief, the two younger, less experienced sales people were earning about one-half of Petitioner's salary package. Apparently, Respondent decided to fire Petitioner, the older salesperson, despite his success and seniority because Respondent believed it could save money replacing Petitioner with a younger person. Such reason is illegal. Metz, supra. Hence, Respondent's Motion for Summary Judgment ought to have been denied.

3. The burden to demonstrate the absence of material fact issues remains with the party moving for summary judgment, (this Respondent), regardless of which party would have burden of persuasion at trial. Chipollini, supra. This Respondent failed to meet its burden to demonstrate the absence of material fact issues. Considering: 1) Petitioner served Respond-

ent longest in the sales department; 2) Petitioner had the greatest record of success bringing in about 60 percent of total annual sales; 3) Petitioner trained and groomed the two younger salespeople whom Respondent retained; 4) Respondent made direct comments about Petitioner's age and its relationship to Petitioner's future employment; and 5) Respondent replaced Petitioner with younger and less expensive (in terms of salary package), salespeople, at very least genuine issues of material fact remain. Hence, Respondent's motion for summary judgment ought to have been denied.

5. In the context of Summary Judgment motion in this age discrimination action, the Court of Appeals erred in affirming after the District Court weighed competing inferences and resolved disputed facts. The Court erred as a matter of law in applying Chipollini v. Spencer Gifts, Inc.

to this case. Hence, the Order granting summary judgment ought to be reversed. Under Chipollini, and its progeny, the District Court may not enter summary judgment unless Plaintiff can raise no genuine issue of material fact as to whether defendant's proffered reason is a pretext for discrimination.

For the reasons set forth above and incorporated herein, Petitioner produced substantial evidence that Respondent's proffered reason was unworthy of credence. Thus, under Chipollini, a jury ought to decide whether or not Respondent's proffered reasons are pretextual.

Instead, the trial Court erroneously decided this genuine issue of material fact as a matter of law. The District Court stated, "In summary, Defendant's decision was based on legitimate business concerns, i.e., laying off the person the employer believed was least likely to provide possi-

bilities in the near future, and Plaintiff's disagreement with this decision does not prove pretext." Memorandum Opinion, Appendix, Vol. 1, p. 22a.

The District Court thus adopted Respondent's version of the facts. The trial court made a fact determination that Petitioner's evidence supporting Petitioner's claim that Respondent's proffered reason was unworthy of credence (set forth above) "did not prove pretext." Id. Under Chipollini, this fact determination ought to have been left for a jury. Chipollini, supra.

Because in most employment discrimination cases direct evidence of the employer's motivation is unavailable or difficult to acquire, the Supreme Court "[has] articulated a method of proof that relies on presumption and shifting burdens of production." Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir, 1984). The Supreme

Court explained "There will seldom be eyewitness' testimony as to the employer's mental processes." U.S. Postal Service Bd of Governors v. Aikens, 460 U.S. 711, 716 (1983). The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that plaintiff has his day in court despite the unavailability of direct evidence. Lock v. Texteon, Inc, 600 F.2d 1003, 1014 (1st Cir, 1979); TWA v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985).

During the consideration of a motion for summary judgment, any doubts as to the existence of genuine issues of fact are to be resolved against the moving party. Goodman v. Mead Johnson & Co., 534 L.Ed.2d 566, 573 (3d Cir, 1976), cert denied, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). Moreover, "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the

trial court must be viewed in the light most favorable to the party opposing the motion." Id. The court should have considered whether evidence of inconsistencies and implausibilities in the Respondent's proffered reasons for discharge reasonably could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to that conclusion that the Respondent did act for discriminatory reasons. Graham v. F.V. Leopold Co., 779 F.2d 170, 172-73 (3d Cir, 1985).

The District Court erred in weighing competing inferences and in resolving disputed facts. For example, the court emphasized that the Petitioner's evidence is not relevant to the Respondent's perception of his performance, seniority or his sales. (e.g., Memorandum Opinion, footnotes 3 and 4, Appendix App. Vol. 1, p. 12a. The District Court overlooked evi-

dence contained in Plaintiff's affidavit which can be read as challenging the Respondent's factual support with regard to its proffered reasons for discharge and failure to rehire.

The issue of the Respondent's intent at the time of the Petitioner's discharge is clearly a factual question. The Supreme Court recently reaffirmed Lord Justice Bowden's treatment of the problem a century ago: "It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483 (1885); U.S. Postal Service Bd of Governors v. Aikens, 460 U.S. at 716-17, 103 S.Ct. at 1482-83. Thus, by pointing to evidence which calls into question the Respondent's intent, the Petitioner raises an issue of material fact which, if genuine, is sufficient to pre-

clude summary judgment.

A defendant which is less than honest in proffering its reason for discharge risks an unnecessary age discrimination verdict. The McDonnell Douglas test is based on the Supreme Court's assumption that "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer...based his decision on an impermissible consideration such as [age]." Furnco, 438 U.S. at 577, 98 S.Ct. at 2950. If the plaintiff convinces the trier of fact that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent in accordance with the Aikens standard. "[P]laintiff must be

given an opportunity to show that the defendant's stated reasons were in fact only pretextual or incredible." Dillon v. Coles, 746 F.2d at 1003. Not only do the holdings of several recent opinions so indicate, but the Supreme Court has on numerous occasions stated that a defendant's proffered reason for discharge may be attacked by means of indirect evidence. See, e.g., Thurston, 469 U.S. at 121, 105 S.Ct. at 621; Aikens, 460 U.S. at 717, 103 S.Ct. at 1482; Burdine, 450 U.S. at 255 n. 10 and 256, 101 S.Ct. at 1094 n. 10 and 1095.

Despite the trial court's suggestion, e.g., Memorandum Opinion p. 14, Appendix p. 23a, Petitioner is not merely claiming that Respondent made an unwise business decision. Petitioner contends that Respondent terminated and failed to rehire Petitioner based upon Petitioner's age. Respondent's contentions to the contrary

are an after the fact justification unworthy of credence.

Contrary to the District Court's finding, Petitioner has not "essentially take[n] issue with defendant's evaluation of its business decisions and practices." Instead, Petitioner argues that Respondent terminated Petitioner based upon age, not legitimate business reason. Petitioner uses indirect, circumstantial evidence that Respondent's proffered reasons are unworthy of credence. Petitioner contends that Respondent's proffered reasons are after the fact justifications to cover up the true discriminatory reason.

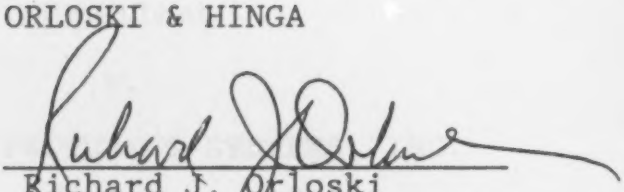
Respondent's proffered justification for termination is that Petitioner allegedly had no prospects for future sales, and Petitioner had the least seniority. Petitioner contended (with supporting Affidavit), that Respondent's justification was after the fact attempt to cover up the true

discriminatory reason. As set forth above, Petitioner's evidence shows that Petitioner had great potential for future sale and that Petitioner had the most seniority, experience and successes. Petitioner's evidence, at very least, creates genuine issues of material fact concerning the credibility of Respondent's proffered reasons for termination. The trial Court rejected Petitioner's argument as a matter of law. Chipollini, supra. The Court of Appeals thus erred in affirmingthat decision. Hence, Petitioner respectfully seeks review of that order by this Honorable Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari ought to be granted.

ORLOSKI & HINGA



Richard J. Orloski
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1763

RAYMOND J. BRADER,
Appellant

v.

LANDIS MANUFACTURING SYSTEMS, INC.

On Appeal from the United States District Court For the Eastern District of Pennsylvania
(D.C. Civil Action No. 90-06750)
District Judge: Honorable E. Mac Troutman

Argued February 28, 1994

BEFORE; STAPLETON, and SCIRICA, Circuit Judges, and SMITH, District Judge*

After consideration of the contentions raised by appellant, it is ORDERED AND ADJUDGED that the judgment of the district court entered July 19, 1993, be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

Walter K. Stapleton
Circuit Judge

ATTEST:

P. Douglas Sisk, Clerk

DATED: MAR 14, 1994

*Honorable D. Brooks Smith, United States District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND J. BRADER Plaintiff	:	CIVIL ACTION
	:	NO. 90-6750
vs.	:	
LANDIS MANUFACTURING SYSTEMS, INC., Defendant	:	

TROUTMAN, S.J.

O R D E R

And now, this 15th day of July, 1993, upon motion of the defendant, which plaintiff does not oppose, IT IS HEREBY ORDERED that defendant's counterclaim in the above-captioned action is **DISMISSED with prejudice** in accordance with Fed.R.Civ.P. 41(a)(2).

E. MAC TROUTMAN, S.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2065 February 22, 1993
#D-88
RAYMOND J. BRADER, Appellant
v.
LANDIS MANUFACTURING SYSTEMS, INC.
(E.D. of PA DC Civil No. 90-06850 [EMT])

Present: GREENBERG and HUTCHINSON
Circuit Judges

Motion by Appellant to re-instate appeal and vacate order of 2-4-93.

For the Court's information:
Copy of the Clerk's 2-4-93 order dismissing appeal for failure to timely file the brief and appendix;
Copy of letter dated 2-10-93 by Appellant to District Judge Troutman in which Appellant states the appeal was taken from a non-final order.

Appellant's brief and appendix were due 1/16/93 received 2/10/93.
On 2-19/93, Appellant advised the Clerk's office he does not wish to withdraw the motion to reinstate the appeal.

O R D E R

The foregoing motion is denied. the court notes that the appellant has represented that the appeal is from an order not currently appealable.

By the Court,

Greenberg, Circuit Judge
Dated March 18, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND J. BRADER, Plaintiff	:	CIVIL ACTION
	:	NO. 90-6750
vs.	:	
LANDIS MANUFACTURING SYSTEMS, INC., Defendant	:	

TROUTMAN, S.J.

O R D E R

AND NOW, this 16th day of October, 1992, upon consideration of the Motion of Defendant Landis Manufacturing Systems, Inc., for Summary Judgment (Doc. #23) and the response thereto, IT IS ORDERED that the Motion is GRANTED and judgment is entered in favor of defendant and against plaintiff.

E. Mac Troutman, S.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND J. BRADER, Plaintiff	:	CIVIL ACTION
	:	NO. 90-6750
vs.	:	
LANDIS MANUFACTURING SYSTEMS, INC., Defendant	:	

TROUTMAN, S.J.

MEMORANDUM

In this Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621, et seq. action, we now consider the Motion of Defendant Landis Manufacturing Systems, Inc., for Summary Judgment.[1] We have jurisdiction pursuant to 28 U.S.C. §1331. We must decide whether plaintiff has proffered

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1. Defendant's motion is actually on a form of order and a brief, and does not have a "motion" as contemplated under the Local Rules of Civil Procedure. Because Plaintiff has not raised this matter and since we believe the motion should be granted we will overlook this omission and consider defendant to have made a motion for the reasons incorporated in its brief.

sufficient evidence to show that age was a determining factor in defendant's decision to initially lay-off and later to not re-hire plaintiff.

For the reasons which follow we conclude that plaintiff has failed to show sufficient evidence of pretext to defeat summary judgment and we will, therefore, grant defendant's motion.

I. BACKGROUND[2]

Plaintiff was born on February 22, 1940, and began his employment with defendant in December 1983. Plaintiff, a salesman[3], singlehandedly developed new accounts

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2.Unless otherwise indicated, the background facts herein are summarized from Plaintiff's Affidavit in Opposition (Doc. #34).

3.Plaintiff, in his affidavit at ¶10, styles himself as a "salesperson/marketing person" to thus differ with defendant's claim that he was simply a "salesperson" Though it is argued that this "marketing person" aspect is important, that is, de-

After his lay-off, plaintiff contacted Laurie Pizza, a Sales Administrator with defendant, and inquired about the Raytheon account. Plaintiff was curious about Randall Ocamb's success at landing any business from Raytheon, one of the possibilities Ocamb previously cited. "I thought maybe he generated a hug[e] contract at Raytheon which might suggest that it as logic to keep him instead of me. According to my information, however, Randall Ocamb did not get a big order from Raytheon..." (Plaintiff's Affidavit in Opposition at ¶23.) During plaintiff's lay-off, Chris Brick left defendant's employ, and defendant hired three new salespersons, all under the age of forty.

As noted, .defendant asserts that plaintiff was laid-off because he did not have any new business prospects lined up. The lay-off was intended to be temporary

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and to last only until business picked-up. Upon learning of plaintiff's contact with Laurie Pizza, DeFazio considered plaintiff's inquiries about the Raytheon account, one for which plaintiff was not responsible, to be a breach of trust, and feared plaintiff attempted to obtain and to wrongfully use confidential and proprietary information. DeFazio, therefore, determined that plaintiff would never be rehired by defendant. (See generally DeFazio Aff.).

II. STANDARD OF REVIEW.

Summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

To defeat summary judgment, an issue of fact in dispute must be both genuine and material. i.e., one upon which a

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reasonable factfinder could base a verdict for the non-moving party and one which is essential to establishing the claim. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court is not permitted, when considering a motion for summary judgment, to weigh the evidence or make determinations as to the credibility thereof. Our sole function, with respect to the facts, is to determine whether there are any disputed issues and, if there are, to determine whether they are both genuine and material. Id. The court's consideration of the facts, however, must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well. Tigg corp. v.Dow corning corp., 822 f.2d 358 (3d Cir, 1987).

In order to obtain a summary judgment,

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the proponent of the motion has the initial burden of identifying evidence, from the sources enumerated in Rule 56, which demonstrates the absence of a genuine issue of material fact. The movant is not required, however, to negate the elements of the non-moving party's case. Lugan v. National Wildlife Federation, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695, 714 (1990). To the contrary, when confronted by a properly supported motion for summary judgment, the opposing party is required to produce, from the same sources, some contrary evidence which could support a favorable verdict.

Additionally, where the non-movant, usually the plaintiff, bears the burden of proof on the issue which is the subject of the summary judgment motion and is confronted by the defendant's argument that the facts established through the discovery

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process do not support the claim, that party must identify evidence of record sufficient to establish every element essential to the claim. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp., 812 F.2d 141 (3dCir, 1987).

In order to defeat summary judgment, the party opposing the motion may not rest upon mere denials of the facts identified by the movant as supportive of its position, nor upon the vague and amorphous argument that the record somewhere contains facts sufficient to support its claims, Childers v. Joseph, 842 F.2d 689 (3dCir, 1987), nor upon substituting "conclusory allegations of the complaint or answer with conclusory allegations of an affidavit". Lujan v. National Wildlife Federation, 497 U.S.s at ___, 110 S.Ct. at 3188, L.Ed.2d at

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716. Instead, the party resisting the motion for summary judgment is required to specifically identify evidence of record, as opposed to general averments, which supports the claim and upon which a verdict in its favor may be based. Id.; Childers, supra.

If the movant succeeds in demonstrating that there are no genuine issues of material fact in dispute, or, as sometimes occurs, if the parties agree as to the essential facts, the Court must then be satisfied that the moving party is entitled to judgment as a matter of law. If the non-moving party has failed to show evidence to support an essential element of the claim, the movant is entitled to judgment as a matter of law because the non-moving party has failed to meet the burden of proof. Lujan v. National Wildlife Federation, 111 L.Ed.2d at 714.

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III. DISCUSSION.

the analysis employed in an ADEA action is similar to the analysis of a Title VII claim. The plaintiff must first establish a prima facie case by a preponderance of the evidence. Upon such a showing, the burden then shifts to the defendant to proffer some legitimate nondiscriminatory reason for the plaintiff's termination. If the defendant shows such a reason, the burden returns to the plaintiff who must thereupon show that the defendant's proffered reason was a mere pretext for discrimination and not worthy of credence, and thus, not the true reason for the termination. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); Turner v. Schering-Plough Corp., 901 f.2d 335, 341-42 (3d Cir, 1990). At all times, it is the plaintiff's burden to

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persuade the trier of fact that age was a determinative factor, as opposed to the sole factor, in the termination decision. The consideration of age must simply have made a difference in the final decision. Turner 901 f.2d at 342.

On a motion for summary judgment in an ADEA action, in addition to the standards discussed above, the plaintiff may defeat the motion by showing evidence, either direct or indirect, of inconsistencies and implausibilities in the defendant's stated reasons that could support a fact finder's inference that the defendant's actions were discriminatory. Id. It has recently been stated, however, that although discrimination is often subtle, "we do not infer from the nature of discrimination suits that a jury determination is required in every case." Billet v. CIGNA Corp., 940 F.2d 812, 828 (3dCir. 1991). The evidence in an

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age discrimination action

> must be enough to support a reasonable inference that the reasons given for the employment decision are pretextual. Merely reciting that age was the reason for the decision does not make it so. [citations omitted]
>
> Thus we, along with numerous other courts, have stated that summary dispositions can be applicable in employment age discrimination cases. [citations omitted]

billet, 940 F.2d at 816 (affirming directed verdict for employer after jury was deadlocked) (emphasis in original). The court concludes that plaintiff has not met this burden.

A. Plaintiff's prima facie Case.

To establish a prima facie case of age discrimination, the plaintiff must be able to show each of the following: (1) plaintiff belongs to the protected class, that is, over the age of forty; (2) plaintiff was qualified for the job from which terminated; and (3) plaintiff was replaced by a person sufficiently younger to permit

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an inference of age discrimination. Turner, 901 F.2d at 342. The Court concludes, as a matter of law and for the purposes of the instant motion, that plaintiff has established a prima facie case, and thus, a presumption of age discrimination.

B. Defendant's Proffered Legitimate Nondiscriminatory Reason.

Defendant's reason for terminating plaintiff was that it had reason to believe that Plaintiff committed a breach of confidence and was very possibly considering the wrongful use of sensitive information. Regarding the plaintiff's lay-off, to the extent that event applies, defendant asserts that economic circumstances forced it to consider the lay-off of a number of employees, including one sales person. DeFazio met with each of the sales persons and discussed what

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prospects they expected to ripen in the near future in order to determine which one would be laid-off. Whether plaintiff told DeFazio that he had no prospects ready or that he had the potential to land a big contract with Mack if only defendant would provide him ore latitude, DeFazio determined that plaintiff should be the sales person laid-off since he believed that the other two salespersons offered more or better business possibilities for defendant than did the plaintiff.[6]

The Court finds that defendant has met its burden, and therefore, the presumption of age discrimination is removed. The burden now shifts back to plaintiff to show

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fendant kept on the person with additional marketing duties, our resolution of this case is not affected by any difference.

6. In addition, defendant considered the seniority of the sales persons. Although plaintiff attempts to calculate his seniority differently than defendant

why defendant's reason is mere pretext and not worthy of credence.

C. Analysis of Plaintiff's Evidence of Pretext.

Plaintiff essentially takes issue with defendant's evaluation of its business decisions and practices. An employee's disagreement with an employer's evaluation of one's qualifications, or disagreement with the employer's evaluation of its own needs or proper business decisions, is not enough to prove pretext. Billet, 940 F.2d at 825. "[A] company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions." Id. An employees' evaluation of his own qualifications are not determinative. Id. In summary, "[i]f the employer's decision was based on legitimate business concerns, i.e., choosing the

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person the employer believes is the best person for the job, the employee's disagreement with this decision does not prove pretext." Id. at 827 (citing, Healty v. New York Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir, 1988), cert denied, 490 U.S. 1098, 109 S.Ct. 2449, 104 L.Ed.2d 1004 (1989).

Plaintiff agues that he had the "greatest proven sales record of all Defendant's salespeople", (Plaintiff's Brief in Opposition at 10), and thereafter discusses his contribution to defendant during his tenure. Defendant, however, did not make its decision based on past achievements, but rather, what it expected the salespersons to achieve in the near future.

Plaintiff attempts to rebut this position by citing his own statements, beliefs, and decisions he would have made if he were in charge, such as, defendant declined to provide competitive prices, and

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"Defendant apparently believed that Defendant had a lock on the Mack business and did not need to compete." (Plaintiff's Brief In Opposition at 12.)

In addition, plaintiff's brief in support argues that plaintiff informed DeFazio that he had no orders

> "for the system at that time. However, Plaintiff had tremendous potential...with Mack, which from past experience, Defendant knew was realistic. Defendant now says it relied on Brick's and Ocamb's representations that they had business coming in. The truth is Defendant's DeFazio admitted to Plaintiff that Brick often projected large sales which never materialized. (Plaintiff's dep. 88-89)."

(Plaintiff's Brief in Opposition at 13.)[7]

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DeFazio considered plaintiff to have less seniority than the other two sales persons.

7.Again, Plaintiff did not attach any exhibits to his brief or any portion of the deposition to his affidavit. After searching the papers before us, we managed, however, to locate that portion of plaintiff's deposition cited in the preceding passage attached to

Plaintiff's argument continues:

> To the extent that Brick and Ocamb did in fact produce projected sales, that would be irrelevant. First, Plaintiff was told Brick and Ocamb did not realize great sales. But--even if they did--the later sales are irrelevant. The focus must remain on Defendant's motive at the time of Plaintiff's termination.

(Plaintiff's Brief in Opposition at 14.) While plaintiff accurately states that the performance of the other sales persons is irrelevant, he continues to argue that they did not produce the projected sales, although defendant offered evidence to the contrary, presumably in an attempt to create a negative inference in his favor. Despite this side issue, and as noted by plaintiff, defendant's motivation at the time remains the only relevant issue.

At the time of the lay-off, defendant wanted to retain those salespersons who had possibilities for the near future. Plaintiff claims that defendant knew Brick

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exaggerated his sales projections (although this is not supported by plaintiff's evidence) and thus defendant's proffered reason is merely pretext. We disagree, since plaintiff has failed to properly support his argument, and since plaintiff's disagreement with defendant's business decisions does not establish pretext. The record simply contains no proper evidence that age was a motivating factor for defendant's decision to lay-off plaintiff or to otherwise show that defendant's non-discriminatory reasons are not worthy of credence. In summary, defendant's decision was based on legitimate business concerns, i.e., laying-off the person the employer believed was least likely to provide possibilities in the near future, and plaintiff's disagreement with this decision does not prove pretext.

Regarding defendant's ultimate

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decision not to re-hire plaintiff, the record is simply bare of any evidence to show age was a motivating factor. The evidence is that DeFazio believed that plaintiff attempted to obtain confidential information and therefore determined that plaintiff would never be re-hired. Plaintiff admits to having a conversation with Laurie Pizza about this matter but asserts that he was only attempting to learn whether the Raytheon account actually came in and thereby determine whether it was, in hindsight, reasonable to lay-off plaintiff. Plaintiff also raises questions regarding the accuracy of and the motive for what Laurie Pizza reported to DeFazio.

As we stated, whether any new account came in is not material, and, in addition, whether Laurie Pizza's report was accurate or in bad faith does not affect our determination since there is no evidence that

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DeFazio suspected as much or otherwise did not believe the report. Plaintiff's questioning of the defendant's business decisions does not establish pretext. Defendant has proffered a non-discriminatory reason why it did not re-hire plaintiff and plaintiff has not shown pretext.

IV. CONCLUSION.

Plaintiff has cited to, but not submitted any portion of, his own deposition to support his claim and cites to conclusory statements, hearsay, and other unfounded positions. There are, therefore, no genuine issues of material fact. Based upon this and the foregoing reasons, defendant's motion for summary judgment will be granted since plaintiff has failed to establish evidence of pretext thus entitling defendant to judgment as a matter

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of law.[8] Hence, an appropriate order follows.

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Defendant's Brief in support as Exh. "B". We do not find any such admission therein.

8.At most, plaintiff's evidence also arguments show that he should have been a highly valued employee and that de-

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fendant's actions in terminating him were irrational economic suicide. Such is not actionable under the ADEA on these facts.

§621. Congressional Statement of findings and purpose.

(a) The Congress hereby finds and declares that-

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages,high among older workers; their numbers are great and growing; and their employment problems grave;

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(4) the existence in industries affecting commerce, of arbitration discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

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fendant's actions in terminating him were irrational economic suicide. Such is not actionable under the ADEA on these facts.